Opinion

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 106—October Term, 1957.

(Argued November 22, 1957 Decided January 10, 1958.)

Docket No. 24673

Gunnleik Berge,

Appellant,

—v.—

National Bulk Carriers Corp. and Todd Shipyards Corp.,

Appellees.

Before:

Hand, Hincks, and Lumbard,

Circuit Judges.

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York, Murphy, *J.*, presiding, dismissing his complaint in an action to recover for personal injuries suffered. Affirmed.

Jack Steinman *for the appellant.*

Victor S. Cichanowicz *for National Bulk Carriers Corp., appellee.*

Patrick E. Gibbons *for Todd Shipyards Corp., appellee.*

Opinion

HAND, *Circuit Judge*:

This is an appeal from a judgment for the defendant entered by Judge Murphy in an action to recover for personal injuries. At the conclusion of the evidence the parties agreed that the only issue to be submitted to the jury was the assessment of damages, the question of defendants' liabilities being reserved for determination of the court. Upon the following facts, Judge Murphy held that the plaintiff who was a rigger employed by the defendant Todd Shipyards had not proved his claim. The ship, Bulklube, was a tanker, owned by the National Bulk Carriers, Inc., which in 1952 decided to reconstruct her and rebuild her in accordance with the standards by the United States Coast Guard and the American Bureau of Shipping as a ship of general carriage. The owner made a contract with Todd Shipyards Corporation to take the vessel to its own shipyard and rebuild her in accordance with approved plans and specifications. This work required removing her decks, burning out partitions and bulkheads which divided her into twenty-three tanks, making new bulkheads and new partitions, putting them in place, renewing the longitudinal and deck beams, reconditioning her engines, boilers, steering gear and all other machinery. As stated in Judge Murphy's opinion, the work amounted "to a virtual rebuilding of the interior of the vessel." The accident happened because while the plaintiff and several other men were working below deck in one of the tanks of the ship, engaged in installing a tank bulkhead in place of the former one, he stood upon a scaffold about 15 feet above the bottom of the tank and was pulling a hoist to raise the new bulkhead into position. During this operation the shackle pin between the hoist and the under-deck "padeye" broke and the chain part of the tackle fell hitting the plaintiff and dis-

lodging him from the scaffold; the shackle pin was afterwards found to be sheare din half, and Judge Murphy held that it was unseaworthy as was obviously true.

Thus the question is whether the situation was within the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and those decisions that have followed it. As we said, *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association*, handed down herewith, the answer depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform. Obviously there must be some limit, else the whole fabrication of a new ship would be included. We can only say that the reconstruction of a ship was not traditionally the task of the crew. *Berryhill* v. *Pacific Far East Line*, 238 Fed. 2d 385 (C. A. 9), cert. den. 354 U. S. 938, is not in conflict with what we believe to be the correct test, and we disagree with *Read* v. *United States*, 201 Fed. 2d 758 (C. A. 3).

Judgment affirmed.

LUMBARD, *Circuit Judge* (concurring):

I concur in the result for the reasons set forth in my dissenting opinion in *Anna Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association* filed this day.

(458)

Opinion

UNITED STATES DISTRICT COURT

Southern District of New York

Civ. 96-282.

Gunnleik Berge,

Plaintiff,

against

National Bulk Carriers, Inc. and Todd Shipyards Corp.,

Defendants.

Appearances:

Harry H. Lipsig, Esq., Attorney for Plaintiff, (Klonsky & Steinman, of Counsel).

Frederick H. Cunningham, Esq., Attorney for Defendant National Bulk Carriers, Inc., (Victor S. Cichanowicz, Esq., of Counsel).

Galli & Locker, Esqs., Attorneys for Defendant Todd Shipyards Corp. (Patrick J. McCann, Esq., of Counsel).

Murphy, D. J.

In its final form, this is an action for personal injuries brought against National Bulk Carriers, Inc. on the theory of unseaworthiness only. National Bulk in turn sues Todd Shipyards Corp. alleging that Todd is obliged to indemnify it, should it be held liable to plaintiff.

Opinion

After trial, but before submission to the jury, all the parties agreed that the court should reserve to itself three factual issues, to wit, (1) whether or not defendant National Bulk Carriers retained control over the vessel, the S. S. Bulklube; (2) whether or not the shackle pin was defective, and (3) if yes, whether or not this was the proximate cause of the accident. The case was given to the jury solely on the question (459) of damages. A verdict of $100,000 was returned. After trial motions were made by both defendants to set it aside as being excessive.

The legal issues awaiting decision by the court relate to whether or no the warranty of seaworthiness applies to this plaintiff and whether or no defendant Todd is obligated to indemnify defendant National Bulk Carriers.

Most of the facts were undisputed. National Bulk Carriers, the owner and operator of the tanker S. S. Bulklube, entered into a contract with Todd whereby the latter was to perform certain rather extensive repairs, including renewals of the transverse and longitudinal bulkheads, for a contract price of $981,133. The vessel was delivered to Todd on June 22, 1952, and returned to its owner December 19, 1952. On the date of the accident it was tied up alongside a pier in Todd's shipyard.

By the terms of the contract, the work was to be carried out "under the supervision of and to the satisfaction of representatives of the U. S. Coast Guard, American Bureau of Shipping and Owner." In this connection, the vessel's former chief mate was aboard every day from 8 A.M. to 5 P.M. acting as Assistant Repair Supervisor. Sleeping quarters aboard ship were available for his convenience if he chose to use them. He had not signed articles and was paid a weekly salary the same as defendant's other shoreside employees. National Bulk Carriers'

Port Engineer also came aboard every day, although he had no regular hours. These men gave no orders but inspected the work as it was completed.

The contract also called upon Todd to provide all the necessary labor and material required for the completion of the work, and it is conceded that Todd Supplied the materials involved in the accident, including the shackle pin.

(460) There were no provisions in the specifications pertaining to indemnification. The printed terms on Todd's letterhead contain the following language: "In connection with the accident and/or indemnity and/or insurance clauses, if any, contained in your specifications, relating to liability for personal injuries, please note that we do not agree to same, in so far as they undertake to impose any liability or any obligations to take out or maintain insurance beyond the liabilities or the obligations to insure imposed upon us by law." The specifications were accepted subject to the above condition.

On October 31, 1952, the date of the accident, plaintiff was employed as a rigger by Todd. He and several other men were working below deck in one of the tanks of the Bulklube. The specific task involved the installation of a tank bulkhead. Prior to the accident the bulkhead had been removed and renewed by Todd. The installation operation proceeded in the following manner; employees of Todd welded padeyes to the under-deck, attached shackles to them, hung chain hoists from the shackles, brought the bulkhead from the pier and lowered it into the tank, welded padeyes onto the bulkhead, attached the above mentioned chain hoists to the bulkhead, raised it 3" to 4" off the deck and set it against the framework where it was

permanently welded into place, and finally removed the padeyes from the bulkhead and the under-deck. Plaintiff was standing on a scaffold approximately 15 feet above the bottom of the tank, and had just begun pulling on the chain hoist to raise the bulkhead into position when the shackle pin between the chain hoist and the under-deck padeye sheared off and the chain part of the tackle fell hitting the plaintiff who fell from the scaffold to the deck below. Upon inspection after the accident, the shackle pin was found to be sheared in half although it appeared to be bright and shiny.

(461) Upon these undisputed facts I find: (1) that at the time of the accident defendant National Bulk Carriers was not in control of the vessel; (2) that the shackle pin was defective; and (3) that the defective shackle pin was the proximate cause of the accident.

Thus, plaintiff is entitled to a verdict if he can avail himself of the warranty of seaworthiness. The issue of control is no longer of much importance since the decision of *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478 (9th Cir. 1953), *aff'd* 347 U. S. 396 (1954).

Plaintiff relies primarily upon *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); and *Lester* v. *United States*, 234 F. 2d 625 (2nd Cir. 1956), *cert. granted*, 352 U. S. 889 (1956). *Sieracki* was the first of a series of opinions extending the benefits of the warranty of seaworthiness to those other than seamen. Plaintiff in that case was a stevedore employed by an independent contractor, actually engaged in loading the vessel at the time of the accident. The court stated the problem to be "whether the shipowner's obligation of seaworthiness extends to longshoremen *injured while doing the ship's work aboard.*"

At 89 (emphasis added). In this connection the court went on to say that "historically the work of loading or unloading is the work of the ship's service, performed until recent times by members of the crew." At 96. References to traditional ship's service are frequent throughout the opinion and leave little doubt that the warranty of seaworthiness was extended only to those stevedores performing traditional ship's service, and not to longshoremen in general.

In *Pope & Talbot, Inc.* v. *Hawn*, recovery on the basis of unseaworthiness was permitted a carpenter, employed by an independent contractor, who was injured while repairing a "slight defect" in the grain loading equipment (462) during loading operations. But here again the basis for extension of the warranty rested on the type of work done and its relation to the ship. In his concurring opinion Mr. Justice Frankfurter discussed *Sieracki* and concluded that "the decision was based on the fact that longshoremen were doing seamen's work and that therefore they should be ontitled to a seamen's remedy." At 415.

The *Lester Case* involved an electrician employed by the Marine Basin Co. who was injured upon a dry-docked vessel while working on the running light panel. The Court of Appeals reversed the trial judge and denied recovery on the ground that the ship was not unseaworthy. Plaintiff makes much of the fact that the government seems to have conceded in its brief that a warranty of seaworthiness applied. But the issue was never raised and the Court of Appeals never discussed it. Had the court held in libelant's favor there might be some merit in plaintiff's contention that silence implied assent but since the decision was in respondent's favor we feel any inference is unwarranted.

Applying the standards suggested by *Sieracki* and *Pope & Talbot, Inc.* v. *Hawn* to the present case, it is obvious that the nature of Mr. Berge's employment makes his case easily distinguishable from those on which he relied. The cases of *Berryhill* v. *Pacific Far East Lines*, 238 F. 2d 385 (9th Cir. 1956) and *West* v. *United States*, 143 F. Supp. 473 (E. D. Pa. 1956), the facts in which are almost identical to those in the case at bar are more clearly analogous. Both cases in denying recovery stressed, as indeed the Supreme Court did, that the warranty of seaworthiness was extended to workmen other than seamen in the traditional sense of the word, because they were "doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki*, *supra* at 99.

(463) The test then is not the name given to plaintiff's calling or trade but the nature of his work, and viewed in this light it is abundantly clear that plaintiff was not performing usual seamen's work. Granting that seamen have historically been required to perform some repair work both at sea and in port, nevertheless, they have never traditionally been required to remove, renew and reinstall transverse and longitudinal bulkheads—work which amounts to a virtual rebuilding of the interior of the vessel. Since the whole rational of *Sieracki* rests on the premise that a shipowner cannot escape its absolute obligation to provide a seaworthy vessel by contracting to have a third party perform the services traditionally performed by seamen, it becomes apparent that once the third party performs services different from those usually performed by seamen, the warranty of seaworthiness which was historically designed to protect seamen, need no longer apply. *Cessante ratione legis, cessat et ipsa lex.* Consequently the complaint is dismissed.

In view of this determination the question of indemnification and the motions to set aside the verdict as excessive have become moot. No decision is rendered concerning them, and they are dismissed and denied, without prejudice to their being raised again should the need arise.

Judgment accordingly.

THOS. F. MURPHY
U. S. D. J.

Dated, New York, N. Y., February 26, 1957.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957.

(Argued November 21, 1957 Decided January 10, 1958.)

Docket No. 24551

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor

of the plaintiff in an action to recover damages for the death of the decedent in the State of New Jersey because of the negligence of the defendants and of the unseaworthiness of a pilot boat on which he was employed. Affirmed.

LAWRENCE J. MAHONEY *for the appellants.*
NATHAN BAKER *for the appellee.*

HAND, *Circuit Judge*:

This appeal is from a judgment for the plaintiff entered on the verdict of a jury, awarding damages for the death of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury that under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the

ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus, means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not "adequate to remove the fumes."

The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.[1] The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,[2] but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his

[1] *United States* v. *Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker* v. *Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge* v. *Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, §561.

[2] *Leathers* v. *Blessing*, 105 U. S. 626, 630.

activities."[3] Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the "methods and manner" of its use were proper. So much for the negligence count.

Juite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,[4] rightly or wrongly the opposite doctrine has become so firmly settled since *The Osceola*, 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a "business guest" on a vessel within the navigable waters of New Jersey. In *Guerrini* v. *United States*, 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot* v. *Hawn*, 346 U. S. 406 or *Petterson* v. *Alaska SS. Co.*, 347 U. S. 396, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the

[3] Restatement of Torts, Vol. II, §344, Comment b.

[4] "Seamen, Seaworthiness and the Rights of Harbor Workers," Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn, supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra.*

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read* v. *United States*, 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge* v. *National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contribu-

tory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg*, 119 U. S. 199; *Lindgren* v. *United States*, 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, §688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey[5] which provides in general terms: "When the death of a person is caused by a wrongful act, neglect or default such as would * * * have entitled the person injured to maintain an action for damages * * * the person who would have been liable * * * shall be liable in an action for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard* v. *The Tungus*, December 23, 1957) that they did. In spite of the zeal with which the contrary has been argued, we think that the majority was right. *Graham* v. *Lusi*, 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was

[5] N. J. S. A. 2A:31-1.

no breach of warranty, and then went on to say that in any event his administratrix could not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: i.e., whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot* v. *Hawn, supra*, it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state, no matter where suit upon it was brought.[6] In *Pope & Talbot* v. *Hawn, supra*, however, the Court held that contributory negligence was not a bar to an action at law by a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.[7] The following language

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[6] *Robinson* v. *Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette* v. *Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien* v. *Luckenbach S.S. Co.*, 293 F. 170 (2d Cir. 1923); *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham* v. *A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 per Addison Brown, J.); *The James M'Gee*, 300 F. 93 (S. D. N. Y. 1924).

[7] Cf. *Garrett* v. *Moore-McCormick Co.*, 317 U. S. 239.

we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, the First Circuit in *O'Leary* v. *United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with Pope & Talbot v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death." We are aware that *Curtis* v. *Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary* v. *United States Lines Company*, *supra*, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants, was turned over to Rodermond Industries, Inc. for its annual overhaul and

inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City, New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

> "Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they

brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high compression "blower" was placed so that it would exhaust foul air out through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion,

both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.[1] From a concept resting on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the ac-

[1] See Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381 (1954); The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, The Law of Admiralty, 315-324, 358 (1957).

tivities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance expenses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a danerous and unusual nature that it is beyond the com-

petence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

The case of *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the granting wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki*, *Hawn* and *Petterson*[1] cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are en-

[1] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

titled to a warranty of seaworthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge* v. *National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A:31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence.

There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the view of *Curtis* v. *Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expecting the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. §901 *et seq.* See *Davis* v. *Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy* v. *Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), aff'd 20 N. J. Super. 486, 90 A. 2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their

failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to Halecki's death. Moreover our reversal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January one thousand nine hundred and fifty-eight.

Present: HON. LEARNED HAND
HON. CARROLL C. HINCKS
HON. J. EDWARD LUMBARD
Circuit Judges.

GUNNLEIK BERGE,
Plaintiff-Appellant,

v.

NATIONAL BULK CARRIERS, INC., and TODD SHIPYARDS CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.